SUPREME COURT OF THE UNITED STATES

No. ~~893~~ 69

DELVAILLE H. THEARD,

Petitioner,

versus

UNITED STATES OF AMERICA

On petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF IN REPLY TO THE SOLICITOR GENERAL.

DELVAILLE H. THEARD,
Pro Se.

AUTHORITIES

Cases

Statutes, etc.

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The fact that the Solicitor General has written a comprehensive Brief in this matter indicates that this case is an unusual and important one.

For years, petitioner has been persecuted by many in New Orleans. They seem unable to appreciate that a lawyer who at one time was very ill, may, as a result of rest, hospitalization and treatment, wholly recover from his illness; and, by his industry, energy and application and by his current irreproachable conduct, be justified in

seeking to recover the position of distinction and intellectual leadership which, as an active practitioner and professor of law, he formerly enjoyed at the bar.

Since the Solicitor General has seen fit to call this Court's attention to the error of the Clerk of the United States Court of Appeals for the Fifth Circuit in the caption in this cause, and since he has declared that the United States has never been a party to this action, it is fair to ask whom the Solicitor General represents.

In any event, the petitioner is very happy that the Solicitor General has appeared in this case.

This is not a case which involves communistic lawyers or any of the other problems, trials and questions rampant at the bar of the United States in these perilous days; but it is a case, important to those who want to see justice done, and further a case without a precedent and absolute unique in its facts and with regard to the sole question presented, namely: Whether it is legal and proper to disbar a lawyer, who is at the present time perfectly well and in all respects qualified, because, twenty years ago, he suffered a mental breakdown from which he has now completely recovered; especially when it will not be denied that for the six years immediately preceding the disbarment decree, this lawyer was in very active practice without a single word of reproach and criticism.

Indeed, the appearance of the Solicitor General may be very helpful, since surely the somewhat unusual circumstance of his active participation herein will focus in a special manner the attention of this Court on the Record

and on the merits of the petitioner whom, twenty years after the fact, these officials want to disbar, not because of any acts he may unwittingly have committed under his then condition of mental infirmity, but strictly and only, despite his complete recovery many years since, because of his said former mental illness.

Petitioner was licensed to practice law in 1910. He was then twenty-two years of age. He was a graduate, with an entirely satisfactory scholastic record, of Tulane Law School, New Orleans. He at once entered upon the practice of law.

In 1916, he became the Editor in Chief of the (Tulane) Southern Law Quarterly (Volumes 1, 2 and 3), which Law Review was stopped by the first world war. When said Journal was resumed as Volume 4 of the Tulane Law Review, petitioner was a member of its Editorial Board, a position which he held until his illness in 1935.

Petitioner, although always engaged in general law practice, was considered to be an expert in real estate law, the settlement of estates, wills, administration.

He was invited to join the faculty of the Tulane Law School as a part-time professor in 1919. This service continued, without interruption, until 1935, when his illness made it necessary for him to withdraw. The thanks of the University (he had served always without remuneration during these sixteen years) were in part reproduced in the annotation at page 1 of his petition for certiorari herein.

Undue application to his duties, both at the law school and particularly in one of the most active law practices in New Orleans, unhappily ended in his mental breakdown in 1934, 1935 and 1936; he was *non compos mentis.*

He was committed to DePaul Sanitarium, New Orleans, (probably the largest Mental Hospital in the South) entering there as a patient on September 2, 1936. He remained confined there until July 1943, when he was moved to the East Louisiana State Hospital (for the insane), at Jackson, Louisiana. There, the improvement in his condition, which had already been observed during the previous two years at De Paul, reached the point where, in February, 1943, he was transferred to the Infirmary at New Orleans. He remained there until February, 1947, when, being completely restored to health, he was released.

Petitioner has never been convicted of any criminal offense.

In 1936, Theard had been civilly interdicted in the Civil District (probate) Court in Orleans Parish. This decree of incapacity was lifted by the judgment of the same Court in May, 1948.

Petitioner at once resumed practice, with notable success. It seems everyone, except certain officials of the State Bar Association and some members of its Committee of Professional Ethics and Grievances, realized that petitioner had been very sick, the victim of serious illness, and by no means a criminal. Many old clients, and some new ones as well, flocked to him, and, being, as even his most implacable professional enemies will concede, a lawyer of considerable experience and always of unremitting indus-

try, he developed, in a few months, a sizeable practice. This is well attested by the fact that, from May, 1948 (when his civil interdiction was lifted) until February, 1954 (when the State Court decree of disbarment became final), petitioner, who at no time had either associates or clerks, prepared and tried thirty-seven appeals in the Court of Appeal for the Parish of Orleans and in the State Supreme Court, in addition to countless cases in the *nisi prius* courts.

The present case is absolutely unique, and a proper case for the issuance of a certiorari, for this reason: Here is a man of good standing, sound mental equipment and conceded diligence in his business, who, nearly twenty years ago, was stricken with a mental and physical breakdown which brought about a condition of complete irresponsibility. As the result of his mental infirmity, he committed some regrettable acts from which it is well known that he derived no personal benefit; he is now a man of exiguous means and no property. When his mental condition became acute and noticeable, he was moved by his wife, parents and friends, to DePaul Sanitarium, as above stated, and later to the other mental institutions mentioned; his total period of hospitalization covering eleven years of uninterrupted confinement and treatment (from 1936 to 1947).

In the State disbarment suit, instituted in 1952, the Commissioner, a well known New Orleans lawyer, who heard the case under appointment of the Supreme Court, reported, (as the Solicitor General notes in his Brief herein) that unquestionably petitioner was suffering, on or about the date of the act or acts complained of, from some type of insanity and was irresponsible.

This Report, of course, was disappointing to the Committee on Professional Ethics, whose members had engineered the disbarment suit for an alleged offense committed by petitioner twenty years previously; and, at the argument and trial before the State Court, the Committee left no stone unturned to secure a decision that the act of Theard, on which the disbarment action was sought, had been willful and felonious.

But the Supreme Court refused to so hold or even to consider that complaint[1]; but, although the same Court had already held[2] that petitioner was insane in 1934 and 1935 at about the time of the commission of the act in question, and that what he had done was due to a condition over which he had no control and for which he should not be treated as a criminal, the Court decided, both in passing on the exceptions to the disbarment[3] and in its final opinion in the matter[4] that he must, in the year *1954*, be disbarred, because in 1935, whilst insane, he had committed, without legal responsibility and unconsciously, this very regrettable but irresponsible act.

This case is unique because there is no other case in the books, where a court, in one decision, absolved the lawyer-defendant from all responsibility because of his mental infirmity releasing him from culpability as a criminal, and by another decision, more or less in the same breath, declared that, because of this insanity and excluding all charges of felonious and willful conduct, it would

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1 Louisiana State Bar Association v. Theard, 225 La. 98, 72 So. 310.

2 State v. Theard, 212 La. 1022, 34 So. (2d) 248.

3 Louisiana State Bar Association v. Theard, 222 La. 328, 62 So. (2d) 501.

4 See Note 1.

nevertheless disbar the lawyer solely on account of his said insanity; all this despite the complete recovery of the lawyer at the time of the decision and for some seven years previously.

The statement at page 10 of the Brief of the Solicitor General that, according to the accepted rule, disbarment may be based on acts committed during insanity, is not supported by the decisions which he cites. In the *Patlak* case, 368 Ill. 547, the Court was not satisfied with the evidence of respondent's insanity. Here are its very words:

> "The testimony is conflicting as to whether Patlak was sane or insane on the respective dates he had the transactions with the five named complainants. . . ."

Contrary to the purpose for which cited, the Pennsylvania Court declared in the *Kennedy* case, 178 Pa. 232, 35 Atl. 995, that, if it were satisfied by the evidence that the respondent was of such unsoundness of mind as to be actually insane and to render him unable to have known the difference between right and wrong, it might feel inclined to follow the argument of his counsel. But the Court found the evidence insufficient to establish respondent's insanity. In the case now before this Court, the insanity of the petitioner is established by the judgment of the same State Court which ordered his disbarment for that reason exclusively.

In the *Manahan* case, 186 Minn. 98, 242 N. W. 548, respondent was afflicted with a painful dermatitis of the hand and feet brought about by a nervous condition. The referee found that respondent was fully capable of

distinguishing between right and wrong and of appreciating the consequences of his acts. The Minnesota Court did not say that it would disbar an attorney for acts committed whilst insane.

In the *Fitzgibbons* case, 182 Minn. 373, 234 N. W. 637, the Minnesota Court held that respondent's mental powers had not been affected by an operation which left him subject to attacks of epileptiform and periodic nervous disturbances. Again, the Court did not say that it would disbar the attorney even if it had found (which it did not) that this mental condition had affected his capacity to distinguish right from wrong.

In re Nicolini (N. Y.), 262 Appellate Division Reports, 114, a psychiatrist, in response to a hypothetical question, "thought" that due to domestic troubles between the defendant and his wife, he was under a "tremendous emotional upheaval" during the time in question. The Court held that defense was insufficient.

In re Vincent (Ky.), 282 S. W. (2d) 335, a case of suspension. The Court considered "some physical and mental disturbance" and considered same insufficient.

In re Bivona (N. Y.), 261 Appellate Division Reports, 221, 222, the defendant suffered from epileptic amnesia, but the Court said: "There is no evidence, however, that the acts complained of resulted from such a condition."

In re Creamer, 201 Oregon 343, 270 P. (2d) 159, the Court approved a finding of professional misconduct, but stated that the record showed that, at the time defend-

ant committed the acts he was suffering from a mental disorder. The Court held (in a decree closely applying to the issues now before this court) that, on showing of patient's recovery, he might be reinstated.

That was a whimsical and unsound decision depriving petitioner of his property right to practice his profession, and utterly violative of the fundamental precepts of the Fourteenth Amendment.

No one doubts petitioner's complete recovery at the present time and ever since his interdiction was lifted by court decree in 1948. The numerous law cases that he has tried since that 1948 decree and his personal preparation for and individual management of the defense to the present disbarment action in the Federal District Court, the Court of Appeals and in this Court, demonstrate that he possesses, at the minimum, the qualifications of a competent lawyer. Alone in this case, he has written all the pleadings and the Briefs. He personally argued the case before the District Judge and in the Circuit Court of Appeals. Everything that has been done in the present case, including the present Reply to the Solicitor General, is the work of petitioner alone.

The presence and active participation in this cause of the Solicitor General suggests that the fair and proper way to go into and adequately dispose of this case would be by the granting of the prayer for certiorari. Due to his manifest interest in this matter, the Solicitor General no doubt would welcome such a ruling; and the petitioner, who has every intention of continuing to handle this matter personally, feels that, if he were afforded the oppor-

tunity of appearing before this Court and presenting his qualifications and orally arguing his case for the reversal of the federal decree of disbarment, he would be able to make an impression which, he earnestly believes, would be convincing and favorable.

The Louisiana decision to disbar petitioner, it is submitted, was particularly a mistaken one, based as it was exclusively on insanity, particularly and specifically excluding all consideration by the Court of any alleged charge of misconduct.[5]

In Louisiana, disbarment does not depend, as it does in every other State and also in the federal courts, on the appreciation by the Court of all grounds urged to justify a decree removing a lawyer from the list of his brethren. Disbarment is not in Louisiana a matter lying entirely in the discretion of the Judges. It is a Constitutional matter. One may be disbarred only for misconduct, and not for anything else.[6] The Louisiana Judges are of course bound by this Constitutional provision; and it has been widely considered that the decree of the State Supreme Court disbarring petitioner on the ground of illness and excluding all consideration of alleged misconduct, was particularly weak, illegal and in direct violation of the State fundamental law and inevitably of substantive due process.

The Solicitor General has misconceived the petitioner's position in the present case. He is mistaken

[5] In Louisiana State Bar Association v. Theard, 225 La. 98, 72 So. 310, the Louisiana Supreme Court said: "In our opinion, it matters not whether the dishonest conduct stems from an incapacity to discern between right and wrong or was engendered by a specific criminal intent".

when he says that the United States Court must use the State disbarment decree as its cause of action for disbarment in the Federal Court. That the United States Attorney happened to do this in the present case, merely indicated his belief that the State decree was, in his opinion, sufficient.

One thing appears to be certain: If the United States Attorney, as in the present case, chose to use the State Court decree as a basis for his action of disbarment in the federal court, inquiry into the validity of said State Court decree was open to any objection, to the same extent that any other alleged reason for disbarment would have been subject to any defensive attack.

It is somewhat unfair for the Solicitor General to say that, in the situation of the present case, the petitioner, in his attack on the State Court decree which the United States Attorney saw fit to present as his sole cause for disbarment, "seeks to utilize the federal court (suit) as a vehicle for obtaining another review, albeit collateral, of the State Court order."

Be it remembered that it was the United States Attorney who selected said State decree as the justifica-

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[6] Louisiana Constitution of 1921, Article VII, Section 10: "It (the Supreme Court) shall have exclusive original jurisdiction in all disbarment cases involving misconduct of members of the bar with power to suspend or disbar under such rules as may be adopted by the Court. . . ." The Articles of Incorporation of the Louisiana State Bar Association are, by order of the Supreme Court of date March 12, 1941, made the rules of the Court by which the Association is governed. In re Jones, 202 La. 729, 12 So. (2d) 795, 796. Section 4 of Article 13 of said Charter and Rule of Court that disbarment can only be based on a "**willful** violation of any rule of professional ethics. . . .". See said Charter reproduced in Volume 21 of West's L. S. A. Revised Statutes of Louisiana, page 380.

tion and sole cause of action for the attempted disbarment in the federal court, and that, by order of the District Court, the petitioner was called upon to show cause why the relief selected and prayed for by the United States Attorney should not be granted.

It can not be said, under familiar principles, that the previous denial in this Court of the petition for certiorari to the State Court, is a cause for denying the present application.[7] If it was so, it was totally unnecessary for the Solicitor General to do anything in the present case, except to ask the Court to apply such rule.

The forces that obtained Theard's disbarment in the State Court and the influences and officials that are now seeking the same relief in the federal court for an act *twenty years old* performed during a period of non-responsibility due to illness (from which happily a complete recovery has been effected), perpetrated an act of monumental injustice and a violation of law and a deprivation of *petitioner's property right to practice his profession.* Is it to avoid an investigation of the so-called merits of such a proceeding in this Court, that the Solicitor General pleads or suggests some kind of *res judicata*; urging that the State Court decree should be accepted here under some rule of comity which really does not exist, thus preventing a full consideration of such an important matter in a tribunal free from local influences and prejudices?

We think it is well settled that there is no justification for the position that said previous denial of certiorari to the State Court warrants a similar denial in the federal

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[7] Robertson & Kirkham, "Jurisdiction of the Supreme Court" (1951), Sec. 316, pages 603, 604, 605, 610.

case against petitioner,[8] it being significant that in the latter case the Solicitor General feels it his duty to appear and offer his objections in a full discussion of what he conceives to be the merits of the instant case.

It is submitted that it is impossible to justify as correct a State decree of disbarment on the ground of insanity only, when the act complained of happened twenty years ago, and the petitioner having fully recovered his health after *eleven years* of hospitalization, practiced his profession, very actively and without one word of criticism of his conduct, for nearly *seven years* before the instituting of the disbarment proceedings.

To use illness twenty years old and from which there has been complete recovery is not a sound, fair and reasonable reason for depriving a lawyer of the *property right* to practice his profession.

And, of course, this inevitably brings up the question of *property right—want of due process—substantive due process*,—of which petitioner has been deprived by the decree of the District Court and the Circuit Court of Appeals; to the same extent that his said property right was taken away from him by the judgment of the State Court.

The whole case both in the State Court and in the Federal Court shows that petitioner never complained of any lack of opportunity to defend himself,—procedural due process. It is not correct for the Solicitor General to pretend that such is now petitioner's complaint.

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[8] Ex parte Tillinghast, 4 Pet. 108, 7 L. Ed. 798; Selling v. Radford, 243 U. S. 46, 61 L. Ed. 585, 37 Sup. Ct. 377; Thatcher v. United States, 6th Cir., 212 Fed. 801, 129 C. C. A. 225.

The excerpt from *Ex parte Wall*, 107 U. S. 265, 27 L. Ed. 552, quoted at page 10 of the brief of the Solicitor General, *concedes that an attorney's calling or profession is his property*, and merely holds, that, if so provided by the Court Rules, disbarment proceedings may be conducted summarily and by Rule, such procedural due process, as petitioner freely admits, is sufficient.

Anyone who has to any extent familiarized himself with the papers herein, must know that petitioner's special complaint has always been that the State Court fell into serious error, when it declared that *Ex Parte Garland*[9] merely assured procedural due process to a lawyer sought to be disbarred. That decision on the contrary particularly holds that sound, substantive and compelling reasons must exist to deprive a lawyer of his *property right to practice.*

Petitioner's appeals and petitions for review both in the State Court and in the Federal Court disbarment proceedings, have, at all times, particularly emphasized that he was being disbarred for a whimsical, arbitrary reason, unquestionably constituting want of substantive due process. Petitioner complains, and has always complained, that there must be just grounds and adequate reasons for depriving a lawyer of his *property right* to practice his profession; and that, under the Fourteenth Amendment, this right cannot be taken away without just and due cause.

We think the Solicitor General avoids this question, when, instead of discussing it and undertaking to meet and answer it as exhaustively covered in the petition for

[9] Ex parte Wall, 4 Wall. 333, 18 L. Ed. 366.

certiorari herein, he chooses to direct his attention to a question of procedural due process which clearly forms no part of the present case.

Our thesis is that, where a man of previous irreproachable conduct and standing at the bar as an active practitioner for then nearly thirty years, becomes ill and suffers a *nervous breakdown*, and during said period of breakdown is involved in acts which are subject to criticism, but which according to a well considered opinion of the Supreme Court[10] show that he was insane at the time and should not in reference thereto be treated as a criminal; and when that man is treated and hospitalized for this condition for eleven years but regains his health completely in 1948, his civil interdiction being lifted by court decree; whereupon he resumes practice and thereafter practices for *six years* without one word of criticism of his conduct, personal or professional, and during these six years (1948 to 1954) tries 37 contested cases in the appellate courts and countless cases in the lower tribunals,—it is submitted that his disbarment merely for the reason that he suffered from this condition of illness more than twenty years before, deprives him of his *property right* to practice his profession without adequate cause, illegally, and in violation of Due Process, contrary to the Fourteenth Amendment and the principles enunciated by this Court in *Ex Parte Garland*, 4 Wall. 333, 18 L. Ed. 366; *Wieman v. Updegraff*, 344 U. S. 187, 97 L. Ed. 216, 73 Sup. Ct. 215, and the dissenting opinions of Associate Justices Black, Douglas and Frankfurter in *Barsky v. Board of Regents*, 347 U. S. 442, 98 L. Ed. 829, 74 Sup. Ct. 650.

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[10] See Note 2.

As Justice Douglas (with Justice Black concurring) said in the *Barsky* case, 347 U. S. at page 472, 98 L. Ed. at page 850, 74 Sup. Ct. at page 666:

> "The Bill of Rights does not say who shall be doctors or lawyers or policemen. But it does say that certain rights are protected, that certain things shall not be done. The Bill of Rights prevents a person from being denied employment who . . . is wholly innocent of any unlawful purpose or action. Citing Wieman v. Updegraff, 344 U. S. 183 . . . In this case it is admitted that Dr. Barsky's crime consisted of no more than a justifiable mistake concerning his constitutional rights".

In the case now before this Court, petitioner's "crime", which occurred more than *twenty years ago*, consisted of no more than becoming subject to a serious mental breakdown from which, after eleven years (1936 to 1947) of hospitalization, treatment and care, he completely recovered, so that, when he was disbarred in 1954, he had been in very active law practice, without one word of criticism or complaint, for over seven years.

As said by this Court in *Wieman v. Updegraff*, 344 U. S. 187, 97 L. Ed. 216, 73 Sup. Ct. 215:

> "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power . . . We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary and discriminating".

It is submitted, although there have been in the State Courts other cases of disbarment involving defenses of insanity, that not one of them even remotely resembled the present case. There was in every such case always a doubt about the insanity. Here, the State Court in a separate case[11] solemnly adjudged the insanity of petitioner, and held that the acts of petitioner must be considered accordingly, as they were due to a condition over which petitioner had no control and for which he was not responsible.[12]

In no other insanity disbarment case, had the lawyer sought to be disbarred, been hospitalized and treated for *eleven years* on account of his illness.

In no other such case also, was the prosecution for disbarment instituted nearly *eighteen years* after the act and six years after the lawyer had actively resumed successfully and without the slightest criticism the practice of law, those years of great professional activity and service having demonstrated his complete recovery from the pre-existing illness.

To say that such a person, despite all the admitted conditions and circumstances which demonstrate the contrary, is a menace who should be disbarred for the public good, is to deprive petitioner of his **property** for a reason arbitrary, whimsical, not founded in fact, unreasonable and violative of substantive due process guaranteed by the Fourteenth Amendment.

> "To disbar an attorney is to inflict upon him a punishment of the severest character. He is

[11] See Note 2.

[12] See Note 2.

admitted to the bar only after years of study. . . . Surely, the tremendous power of inflicting such a punishment should never be permitted to be exercised, unless absolutely necessary to protect the Court and the public from one shown by the clearest legal proof to be unfit to be a member of an honorable profession."

Respectfully,

DELVAILLE H. THEARD,
Pro Se.